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Supreme Court of the United States

OCTOBER TERM, 1945.

No. 913.

HARRY CIVILETTI,

Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT AND BRIEF IN SUPPORT THEREOF.

PAUL O'DWYER,
Counsel for Petitioner.

THE COURT PRESS, N. Y. C.

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Supreme Court of the United States

OCTOBER TERM, 1945.

No. .

HARRY CIVILETTI,

Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

PETITION FOR WRIT OF CERTIORARI.

To the Honorable the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

The above named petitioner prays that a Writ of Certiorari be issued to the United States Circuit Court of Appeals for the Second Circuit to review a judgment of that Court (R. 31) rendered in the above case on December 6, 1945, confirming a decision of the Tax Court of the United States which had sustained a determination of the Commissioner of Internal Revenue of a deficiency in petitioner's income tax for the calendar year 1940 (R. 16).

Jurisdiction.

The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended (28 U. S. C. A. Sec. 347 (a)).

The Opinions of the Court Below.

The opinion of the Tax Court (R. 11) is officially reported in 3 T. C. 1274. The opinion of the Circuit Court of Appeals for the Second Circuit (R. 27-30) is reported in 152 Fed. (2nd) 332.

Statute and Regulations Involved.

The statute involved is Section 107 of the Internal Revenue Code defining compensation for services rendered for a period of five years or more. The relevant portion is printed in the appendix at page 17.

Summary Statement of Matter Involved.

The petitioner qualified in 1929 as substituted co-trustee of two testamentary trusts. In each year, from 1929 to 1940, he accounted for the income to the life beneficiary and deducted and retained the statutory commissions for collecting income which aggregated some Seventeen thousand ($17,000.00) Dollars.

In 1940 the petitioner received, upon an intermediate account pursuant to a decree of the Surrogates' Court of the State of New York, the sum of $31,025.12 as principal commissions for services rendered to the principal of the two trusts. No previous payment for or on account of administering the principal had been received by or paid to the petitioner.

The petitioner contends that the commissions allowed by the Surrogates' Court represented compensation for services rendered from the commencement of his duties to the time of the rendition of his account in connection with the administration of the principal of the trusts; that this sum constituted compensation received for per-

sonal services on completion of such services rendered over a period of more than five (5) years and that he is therefore entitled to the benefits of Section 107 of the Internal Revenue Code.

The Court below denied this contention and held that the compensation received in 1940 was not paid on completion of the services.

Question Presented.

Did the Circuit Court of Appeals err in holding that the receiving commissions awarded to a New York testamentary trustee in 1940 for services rendered over a period of more than five years, did not constitute compensation paid on completion of services within the meaning of Section 107 of the Internal Revenue Code?

Facts.

The case was tried in the Tax Court on an agreed statement of facts.

The petitioner is a New York trustee who qualified in 1929 as a substituted co-trustee of two trusts under the will of Adelaide E. Harris who died in 1913, a resident of the State of New York. These trusts provided for the payment of the income to the daughter of the decedent with remainder over of the principal, upon her death, to the grandson and granddaughter of the decedent (R. 12).

The petitioner received the principal of the trusts and administered them during the years from 1929 through 1940. The amount of principal received in each trust was in excess of $1,530,000 (R. 22). In 1940 the petitioner filed an intermediate account in the Surrogates'

Court of New York and in December of that year he was allowed, pursuant to a decree of the Court, the principal commissions of $31,025.12. These commissions were allowed under Section 285 of the New York Surrogates' Court Act and were payable only after an accounting and the allowance thereof by the Surrogates' Court.

During the period accounted for the petitioner had rendered in each year thereof, his annual account of income to the life beneficiary and had deducted and retained his statutory commission for collecting and paying out the income of the trusts. The aggregate of these income commissions over the period was approximately Seventeen thousand ($17,000.00) Dollars and it is conceded and so stated by the Tax Court that unless taken annually these commissions were deemed to be lost (R. 15).

The petitioner allocated in his income tax returns for the calendar year 1940 the $31,025.12 over the years 1929 through 1940 and computed his tax upon the rates prevailing in those years. The Commissioner disallowed the computation and determined a deficiency of $4,181.79 and the Tax Court sustained the respondent's determination (R. 16).

The Court below sustained the determination of the Tax Court (R. 27).

The Decisions Below.

The Tax Court based its opinion on the ground that the trustee's services, as to principal and as to income, were not separable; that therefore, the income commissions received over the period from 1929 through 1940 were payments on account of the total compensation of the trustee and that the petitioner therefore did not receive at least ninety-five (95%) percent of the total compensation for services as trustee in the tax year 1940. The Tax Court

further said that inasmuch as it reached a decision on this point "it becomes unnecessary to decide whether the compensation received by petitioner in 1940 was received 'only on completion of such services' within the meaning of the statute" (R. 16).

The Circuit Court conceded that the half commission received by the petitioner in New York represented payment "for the services theretofore rendered". It denied relief to the petitioner on the ground that under Section 107(b), the half commission had not been received on completion of the trustee's services. It indicated that if the case had arisen under the amendment (Section 139 of the Revenue Act of 1942) which eliminated the completion factor that the petitioner would be entitled to the relief.

Reasons Relied On For Allowance of This Writ.

The Writ of Certiorari should be issued because the decision of the Court below is in error and conflicts in principle with the applicable decisions of this Court holding that a tax law should be construed liberally to give the relief it was intended to provide (*Bonwit Teller & Co.* v. *United States*, 283 U. S. 258).

The Writ of Certiorari should also be issued for the reason that this case presents an important aspect of the administration of the Revenue Law which has not been but which should be decided by this Court and which affects a large number of taxpayers.

Section 107 of the Internal Revenue Code was enacted by the Revenue Act of 1939 and was amended under the Revenue Act of 1942. The application of the section to trustee's commissions has been considered only in the case at bar and in *Smart* v. *Comm.*, 152 Fed. 2nd 333 (C. C. A.

2nd). A petition for a Writ of Certiorari is now pending in the latter case before this Court. The Tax Court in both cases adopted the strict rule of construction that in determining the compensation of a trustee for personal services both income and principal commissions were to be merged and the required percentage computed thereon.

Principal commissions in the case of testamentary trustees are allowed generally by order of the Court upon an accounting and Courts do not permit frequent accountings because of the expense involved to the estate, *Smart* v. *Commissioner*, *supra*. Therefore, the testamentary trustee receives his principal commission at the end of an extended period of time during which he has performed his services. Income commissions however are generally retained by the trustee upon collection of income. As a consequence the total income commissions during such period will exceed the permissive percentage under the section.

Under the rule laid down in the Tax Court a trustee, except in rare instances would be denied the benefits intended by the taxing statutes for he would be unable to allocate his lump sum principal commissions over the statutory period and compute his tax upon the rates prevailing in the respective years.

In the instant case the Court below has rejected the rule in the Tax Court but has adopted the equally narrow construction that in the case of a trustee, services within the meaning of Section 107 are not complete until the termination of the trust.

In the *Smart* case, *supra*, the Court below seems to have retained the strict rule of construction laid down by the Tax Court although it expresses a doubt in the absence of some authoritative ruling.

The decisions of the Court below in both cases raise substantial questions of Federal law which should be settled by this Court and these questions will continue to arise in various cases until this Court renders an authoritative ruling thereon.

WHEREFORE, your petitioner respectfully prays that a Writ of Certiorari be issued out of and under the seal of this Honorable Court directed to the United States Circuit Court of Appeals for the Second Circuit in the above case.

Dated, New York City, March 5, 1946.

HARRY CIVILETTI, Petitioner,

By: PAUL O'DWYER,
Counsel for Petitioner.

Supreme Court of the United States

OCTOBER TERM, 1945.

No. .

HARRY CIVILETTI,

Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

Question Presented, Statement of Case, Statutes, etc.

The statement of the question presented, the statement of the case and the statutes will be found in the petition.

Specifications of Errors and Summary of Argument.

I. The Circuit Court of Appeals erred in holding that the receiving commissions awarded to a New York testamentary trustee in 1940 for services rendered over a period of more than five (5) years, did not constitute compensation paid on completion of the trustee's services within the meaning of Section 107 of the Internal Revenue Code. Such decision is directly contrary in principle to

the decisions of the Supreme Court involving the construction and interpretation of a remedial statute.

II. An important and substantial question of Federal law is involved which has not been, and should be, settled by the Supreme Court.

ARGUMENT.

POINT I.

The Circuit Court of Appeals erred in holding that the receiving commissions awarded to a New York testamentary trustee in 1940 for services rendered over a period of more than five (5) years, did not constitute compensation paid on completion of the trustee's services within the meaning of Section 107 of the Internal Revenue Code. Such decision is directly contrary in principle to the decisions of the Supreme Court involving the construction and interpretation of a remedial statute.

In 1940 the petitioner and his co-trustee filed an intermediate account in the New York Surrogates' Court, and pursuant thereto a decree was entered settling the intermediate account and allowing the petitioner the sum of $31,025.12 for his services in the two trust estates (R. 12). These commissions (referred to by the Court below as *half commissions*) were allowed for receiving principal[1] (R. 22).

[1] The Tax Court in its finding (R. 12) incorrectly stated that the commissions were allowed for "receiving and paying out principal". The fact is that the petitioner received the whole of each trust and paid out no part of it as the opinion of the Court below correctly assumed.

The Court below said with respect to these commissions:

> "It is true that in New York half commissions must be regarded as awarded for services theretofore rendered, and if that is all that Sec. 107 demands the taxpayer at bar would not be excluded by subdivision (b)."

The sole issue, therefore, is the proper interpretation of Subdivision (b) or more specifically the precise scope of the requirement of Section 107 that the compensation be "paid * * * only on completion of such services".

Despite the fact that the Court below regarded the compensation herein as awarded for past services the Court nevertheless held that the compensation was not received on completion of the trustee's services because a trustee's services were considered by it incomplete until the termination of the trust. The Court's position is an illogical one and seems untenable. The services for which compensation was received admittedly were completed to the date of the account. Certainly, had the trustee resigned or been discharged upon the intermediate account or died thereafter, there is no doubt that his personal services would have been complete; the fact that he may continue to perform services subsequent to the date of the account which may be terminated at any time by death or resignation and the compensation for which in all events is absolutely contingent upon his surviving the termination of the trust (*In re Coutt's Will*, 140 Misc. 93) brings into relief the fallacy of the Court's position.

In *Additon* v. *Comm.*, 3 T. C. 427, a member of a liquidating committee of a bank had received compensation for services rendered from 1931 to 1940, but he had

not yet been discharged and some work remained to be done.

The Tax Court said:

> "* * * we consequently view the present question as limited to the narrow issue whether the services for which petitioners received the compensation in dispute can be regarded as having been 'completed' by the time payment was received * * *. Even though the original undertaking was not completed, the part that was paid for had been * * *."
>
> "On such a record we think that all of the services for which compensation was received had been completed at the time payment was made. Since this was the only compensation for these services and since they represented the labor of a period in excess of the five year requirement of the statute, we are satisfied that petitioners have brought themselves within its relief provisions."

The Court below rejected the *Additon* case, *supra*, but it is submitted that no practical distinction can be made between that case and the instant one.

The petitioner contends that under Section 107 (b) the phrase "on completion of such services" refers only to the services for which the compensation was paid.

The commissions of a testamentary trustee in New York in 1940 were separable and based upon two distinct and different sets of services, (1) that of receiving and (2) that of paying out; and the statutory rate of compensation was divided, one-half the rate being allowed for receiving and one-half for distributing or paying out. *Matter of Willets*, 112 N. Y. 289; *In re Barker*, 230 N. Y. 364; *Matter of Busche*, 227 N. Y. 85; *Matter of Morin*, 136 Misc. 823; New York Surrogate's Court Act, Section 285 (printed in Appendix).

By the laws of New York obtaining in 1940 and for more than a century prior thereto, and until the statutory amendments effective September 1st, 1943, no compensation for services respecting the trust estate was due or payable to a testamentary trustee until the same was settled and allowed by a court of competent jurisdiction, as was done in the case at bar.

Surrogate's Court Act (N. Y.), Sec. 285;
Matter of Worthington, 141 N. Y. 9;
Beard v. *Beard*, 140 N. Y. 260;
Matter of Ziegler, 168 App. Div. 735.

The compensation is strictly limited to the percentage or rate of commission fixed by statute.

Matter of Davison, 173 Misc. 323;
Matter of Hurley, 149 Misc. 68;
Matter of Rosenberg, 251 N. Y. 115.

As no further compensation could ever be allowed to the petitioner for receiving, the commission in question at one-half the statutory rate constituted payment in full for this particular service (*In re Coutt's Will*, 140 Misc. 93).

The petitioner, a lawyer, had earned his compensation by personal service, rendered with professional skill, entailing great responsibilities, involving the investing, re-investing, safekeeping, and general care and management of $3,066,110.87 (R. 22), extending over a long period of years. He could not legally be paid until the judicial settlement and allowance of his accounts; and then he received payment in a lump sum. If his income taxes for 1940, the year of the receipt, are to be computed on the

theory that this payment was earned during that one calendar year, the facts would seem to present the ideal example of hardship, inequity and injustice, to remedy which the statute was enacted. *Slough et al.* v. *Comm.*, 147 Fed. (2nd) 836 (C. C. A., 6th Cir.).

We respectfully submit that the decision should be reviewed by this Court and the Writ of Certiorari should be issued because the decision of the Court below conflicts in principle with the decision of this Court that the tax law should be construed with liberality in favor of the taxpayer to afford the relief it was intended to provide. *Bonwit Teller & Co.* v. *U. S.*, 283 U. S. 258.

POINT II.

An important and substantial question of Federal law is involved which has not been and should be settled by the Supreme Court.

The question presented raises an important question of Federal law which has been wrongly decided below and has not been passed upon by this Court. It affects a large number of trustees who receive substantial sums for work performed over extended periods of time and who would otherwise be subjected to an equitable tax burden.

The question is of importance in the orderly administration of the Internal Revenue laws and will continue to arise in various cases throughout the United States until this Court renders an authoritative ruling.

There is presently pending an application for a Writ to this Court in *Smart* v. *Comm.*, 152 Fed. (2nd) 333 (C. C. A. 2nd). The decision in that case was rendered contempo-

raneously with the decision in the instant case. The *Smart* case involves a New Jersey testamentary trustee who received corpus commissions after an extended period of time and who also received income commissions as did the taxpayer herein. The *Smart* case arose under Section 107 as amended by Section 139 of the Revenue Act of 1942 and so far as is relevant to the discussion herein, the only difference between the amendment and Section 107 was the elimination of the completion condition. In the *Smart* case the Court below held that both the income and corpus commissions constitute the "total compensation" within the meaning of Section 107 as amended and that the amount of corpus commissions received in 1941 was less than the statutory percentage.

In the case at bar the same element of income and principal commissions is present but the Court below, did not adopt the theory that income commissions must be added to the receiving commission to determine the "compensation". Indeed the Court below indicated that if the facts at bar had arisen under Section 107 as amended, the petitioner would have been entitled to relief. The two decisions are inconsistent and afford no guide for the proper application of the taxing statute in the case of trustees.

The decision below was erroneously decided and should be reviewed by this Court and a Writ of Certiorari should be issued because the question is of importance in the administration of the Internal Revenue laws and should be settled by this Court. *Detroit Bank* v. *U. S.*, 317 U. S. 329; *Maass* v. *Higgins*, 312 U. S. 443; *Allen* v. *Regents of Univ. System of Ga.*, 304 U. S. 439.

CONCLUSION.

For the foregoing reasons, it is respectfully submitted that the petition for a Writ of Certiorari to the Circuit Court of Appeals for the Second Circuit should be granted.

Dated, New York City, New York, March 5th, 1946.

PAUL O'DWYER,
Counsel for Petitioner.

APPENDIX.

Revenue Act of 1939, c. 247, 53 Stat. 862:

SEC. 220. COMPENSATION FOR SERVICES RENDERED FOR A PERIOD OF FIVE YEARS OR MORE.

(a) The Internal Revenue Code is amended by inserting after section 106 the following new section:

SEC. 107. COMPENSATION FOR SERVICES RENDERED FOR A PERIOD OF FIVE YEARS OF MORE.

"In the case of compensation (a) received, for personal services rendered by an individual in his individual capacity, or as a member of a partnership, and covering a period of five calendar years or more from the beginning to the completion of such services, (b) paid (or not less than 95 per centum of which is paid) only on completion of such services, and (c) required to be included in gross income of such individual for any taxable year beginning after December 31, 1938, the tax attributable to such compensation shall not be greater than the aggregate of the taxes attributable to such compensation had it been received in equal portion in each of the years included in such period.

(b) The amendment made by subsection (a) shall be applicable to taxable years beginning after December 31, 1938." (26 U. S. C. 1940 ed., Sec. 107.)

Surrogate's Court Act (Gilbert-Bliss, Civil Practice of New York Annotated, Book 13, Recompiled 1937):

SEC. 285. Commissions of executor, administrator, guardian or testamentary trustee.

"On the settlement of the account of any executor, administrator, guardian or testamentary trustee, the surrogate must allow to him his just, reasonable and

necessary expenses actually paid by him, and if he be an attorney and counselor-at-law of this state, and shall have rendered legal services in connection with his official duties, such compensation for such legal services as shall appear to the surrogate to be just and reasonable; and in addition thereto the surrogate must allow to such executor, administrator, guardian or testamentary trustee for his services in such official capacity, and if there be more than one, apportion among them according to the services rendered by them respectively.

1. For receiving and paying out all sums of money not exceeding two thousand dollars, at the rate of five per centum.

2. For receiving and paying out any additional sums not amounting to more than twenty thousand dollars, at the rate of two and one-half per centum.

3. For receiving and paying out any additional sums not exceeding twenty-eight thousand dollars at the rate of one and one-half per centum.

4. For all sums above fifty thousand dollars, at the rate of two per centum.

5. The value of any real or personal property, to be determined in such manner as the surrogate may direct and the increment thereof, received, distributed or delivered, shall be considered as money in making computation of commissions. But this shall not apply in case of a specific legacy or devise."

* * * *

"7. If an executor acting as trustee, or if a trustee or guardian, is required to receive income and pay over the same, and such executor, trustee or guardian pays over said income and such executor or trustee renders an annual account to the beneficiary; and

such guardian files an annual inventory as required by section one hundred ninety of this act, of all his receipts and disbursements on account thereof, he shall be allowed, and may retain, the same commission on the amount of income so accounted for as he would be allowed upon principal on a judicial settlement; if such executor, trustee or guardian does not render such annual account or inventory, nor retain his commissions upon his annual account or inventory, he shall be allowed out of income then on hand, if any, upon his judicial settlement, his commissions upon the total income from any money or property then payable to such beneficiary as unpaid income."

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In the Supreme Court of the United States

OCTOBER TERM, 1945

No. 913

HARRY CIVILETTI, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the Tax Court (R. 11–16) is reported in 3 T. C. 1274. The opinion of the Circuit Court of Appeals (R. 27–30) is reported in 152 F. 2d 332.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on December 6, 1945. (R. 31–32.) The petition for a writ of certiorari was filed on

March 5, 1946. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether the "receiving" commissions awarded to a New York trustee in 1940 on an intermediate account are excluded from the application of Section 107 of the Internal Revenue Code because they do not constitute compensation paid on completion of services.

STATUTES AND REGULATIONS INVOLVED

The pertinent statutes and regulations are printed in the Appendix, *infra*, pp. 8–11.

STATEMENT

The facts were in part stipulated (R. 21–22) and in part found by the Tax Court (R. 12–13):

In 1929 taxpayer was substituted as one of the trustees for two trusts created under the will of Adelaide E. Harris, who had died in 1913. The trusts were for the benefit of the decedent's daughter during her life, and upon her death the remainder of one trust was to go to the decedent's grandson and that of the other to her granddaughter. The taxpayer has performed his duties as trustee since his appointment. (R. 12.)

In each year there was an accounting to the life beneficiary and taxpayer received the commissions provided for by New York law for receiving

and paying out the income of the trust. During the period 1929 to 1940 an aggregate of at least $17,000 was paid on that basis. (R. 12.)

In 1940 the trustees filed an intermediate accounting with the Surrogate's Court and a decree was entered settling the intermediate account and allowing taxpayer the sum of $31,025.12 for his services to the two trust estates. (R. 12.) Of this amount $15,346.35 was paid for receiving the principal of trust No. 1 and $15,334.76 for receiving the principal of trust No. 2; $172.41 was paid for disbursements of principal from trust No. 1 and $171.60 for disbursements of principal from trust No. 2. (R. 21–22.)[1]

In his income tax return for 1940 the taxpayer reported the commissions on principal received in that year, and apportioned that amount for income tax purposes over the years 1929 through 1940, relying on Section 107 of the Internal Revenue Code. (R. 12–13.) The Commissioner ruled that the taxpayer was not entitled to the benefits of Section 107. (R. 8.)

The Tax Court upheld the Commissioner's determination on the ground that the trustee's services as to income and principal were not separable so that the taxpayer's income commissions should

[1] Petitioner states (Br. 10) that all of the commissions were paid for receiving and none for paying out principal. This contention is at variance with the stipulation entered into between the taxpayer's counsel and the Chief Counsel, Bureau of Internal Revenue, subsequent to the Tax Court's opinion. (R. 21–22.)

be lumped with the principal commissions; therefore, taxpayer's commissions as trustee in 1940 did not constitute at least 95% of the total compensation received for services as trustee. The Tax Court thus found it unnecessary to decide whether the commissions received by the taxpayer were received only upon completion of the services. (R. 13–16.)

The Circuit Court of Appeals affirmed upon the ground that the commissions received by taxpayer in 1940 had not been paid on completion of the services. (R. 27–30.)

ARGUMENT

This case does not present any conflict of decisions. It was correctly decided and involves no substantial question of importance to be decided by this Court.

The only cases which have considered the application of Section 107 of the Internal Revenue Code (Appendix, *infra*) to trustees' commissions are this case and *Smart* v. *Commissioner,* No. 912, in which a petition for writ of certiorari is also pending before this Court and which involves a different issue. Unlike the *Smart* case, this decision is grounded upon the requirement, applicable to the taxable year 1940, that taxpayer's compensation must have been "paid * * * only on completion of such services" in order to take advantage of Section 107.

The "completion" requirement was removed by

Congress when it amended Section 107 by Section 139 of the Revenue Act of 1942, c. 619, 56 Stat. 798. The statute no longer requires that the services must have been completed so that obviously no question of current importance is presented for review by this case.

The decision is clearly correct. The Circuit Court of Appeals properly interpreted the statute to require that compensation be paid only upon completion of the job or task for which taxpayer is engaged and paid. It is quite evident that taxpayer's duties in connection with the trust principal were not finished. The court correctly held that under New York law the so-called "receiving" commissions and "paying out" commissions in respect to principal are not paid for the simple acts of receiving the principal and paying it out but rather for all services in its care and investment. *Matter of Bushe,* 227 N. Y. 85. The petitioner does not contend otherwise. Section 107 cannot be interpreted, as taxpayer claims, to cover these principal commissions merely because the services for which paid had been rendered. The Circuit Court of Appeals points out that such an interpretation would cover installment payments while a job was in progress merely because the payments were made for work already done; it felt that clearly such payments could not be squeezed into the coverage of the statute. Since advance payments were excluded by other language in the section, making the provision appli-

cable only to compensation received for services covering a period of five calendar years "from the beginning to the completion of such services," the phrase "paid * * * only on completion of such services" can have meaning only if applied to compensation paid after the whole job is finished.

The legislative history of the section removes any doubt of the correctness of the interpretation placed upon it by the Circuit Court of Appeals. In explaining the purposes of the legislation, the Senate Committee on Finance stated that it was designed to meet the hardship of taxing fully persons "who work for long periods of time without pay and then receive their full compensation upon the completion of their undertaking." S. Rep. No. 648, 76th Cong., 1st Sess., p. 7 (1939-2 Cum. Bull. 524). A subsequent legislative revision embodied in Section 139 of the Revenue Act of 1942, c. 619, 56 Stat. 798, which removed the "completion" requirement, emphasized the Congressional understanding that Section 107 required the services to have been completed. After receiving the Revenue Bill of 1942 from the House, the Senate amended Section 128, which amended Section 107 of the Internal Revenue Code, so as to remove the "completion" requirement. See S. Rep. No. 1631, 77th Cong., 2d Sess., pp. 108–110 (1942–2 Cum. Bull. 504). In conference the House managers accepted the Senate amendment which, they noted, deleted "the requirement that the personal services must

have been completed before the required percentage of the compensation is received * * *." H. Conference Rep. No. 2586, 77th Cong., 2d Sess., p. 43 (1942–2 Cum. Bull. 701). This amendment of Section 107 reflects the belief of Congress that a substantial change had been made in the existing statute.

The Tax Court, in *Additon* v. *Commissioner*, 3 T. C. 427, allowed the benefits of Section 107 to a member of a bank liquidating committee on the view that the statutory requirement was directed only at advance payments. The Circuit Court of Appeals properly did not accept the reasoning of that case, but in any event in the *Additon* case the undertaking had been virtually completed for after payment for their services the committee became inactive, remaining in existence only to execute some ministerial acts.

CONCLUSION

No basis exists for review by this Court. The case does not present a question of substantial importance nor is there a conflict of decisions. The decision below is correct. The petition should, therefore, be denied.

Respectfully submitted.

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MARCH 1946.

APPENDIX

Revenue Act of 1939, c. 247, 53 Stat. 862:

SEC. 220. COMPENSATION FOR SERVICES RENDERED FOR A PERIOD OF FIVE YEARS OR MORE.

(a) The Internal Revenue Code is amended by inserting after section 106 the following new section:

"SEC. 107. COMPENSATION FOR SERVICES RENDERED FOR A PERIOD OF FIVE YEARS OR MORE.

"In the case of compensation (a) received, for personal services rendered by an individual in his individual capacity, or as a member of a partnership, and covering a period of five calendar years or more from the beginning to the completion of such services, (b) paid (or not less than 95 per centum of which is paid) only on completion of such services, and (c) required to be included in gross income of such individual for any taxable year beginning after December 31, 1938, the tax attributable to such compensation shall not be greater than the aggregate of the taxes attributable to such compensation had it been received in equal portions in each of the years included in such period."

(b) The amendment made by subsection (a) shall be applicable to taxable years beginning after December 31, 1938. (26 U. S. C. 1940 ed., Sec. 107.)

Surrogate's Court Act (Gilbert-Bliss, Civil Practice of New York Annotated, Book 13, Recompiled 1937):

SEC. 285. Commissions of executor, administrator, guardian or testamentary trustee.

On the settlement of the account of any executor, administrator, guardian or testamentary trustee, the surrogate must allow to him his just, reasonable and necessary expenses actually paid by him, and if he be an attorney and counselor-at-law of this state, and shall have rendered legal services in connection with his official duties, such compensation for such legal services as shall appear to the surrogate to be just and reasonable; and in addition thereto the surrogate must allow to such executor, administrator, guardian or testamentary trustee for his services in such official capacity, and if there be more than one, apportion among them according to the services rendered by them respectively.

1. For receiving and paying out all sums of money not exceeding two thousand dollars, at the rate of five per centum.

2. For receiving and paying out any additional sums not amounting to more than twenty thousand dollars, at the rate of two and one-half per centum.

3. For receiving and paying out any additional sums not exceeding twenty-eight thousand dollars at the rate of one and one-half per centum.

4. For all sums above fifty thousand dollars, at the rate of two per centum.

5. The value of any real or personal property, to be determined in such manner as the surrogate may direct, and the increment thereof, received, distributed or de-

livered, shall be considered as money in making computation of commissions. But this shall not apply in case of a specific legacy or devise.

* * * * *

7. If an executor acting as trustee, or if a trustee or guardian, is required to receive income and pay over the same, and such executor, trustee or guardian pays over said income and such executor or trustee renders an annual account to the beneficiary; and such guardian files an annual inventory as required by section one hundred ninety of this act, of all his receipts and disbursements on account thereof, he shall be allowed, and may retain, the same commission on the amount of income so accounted for as he would be allowed upon principal on a judicial settlement; if such executor, trustee or guardian does not render such annual account or inventory, nor retain his commissions upon his annual account or inventory, he shall be allowed out of income then on hand, if any, upon his judicial settlement, his commissions upon the total income from any money or property then payable to such beneficiary as unpaid income.

* * * * *

Treasury Regulations 103, promulgated under the Internal Revenue Code:

SEC. 19.107-1 [as amended by T. D. 5382, 1944-1 Cum. Bull. 194]. TAX ON COMPENSATION RECEIVED IN TAXABLE YEARS BEGINNING IN 1939 AND 1940 FOR PERSONAL SERVICES RENDERED OVER EXTENDED PERIOD.—Where, in any taxable year beginning after December 31, 1938, and before January 1,

1941, an individual receives compensation for personal services rendered by him, either in his individual capacity or as a member of a partnership, over a period of five calendar years or more from the beginning to the completion of such services, the tax attributable to the amount of such compensation shall, for the taxable year in which such compensation is received, not exceed the aggregate of the taxes attributable to such compensation had it been received in equal portions in each of the years included in the period during which the services were rendered.

With respect to compensation received in taxable years beginning after December 31, 1938, and before January 1, 1941, section 107 is applicable only where at least 95 per cent of the total compensation for such services is paid on or after their completion. It is immaterial when the personal services are rendered provided a period of at least five years elapses during the period from the beginning to the completion of the services. For example, an individual beginning his services on July 13, 1934, and completing them on July 18, 1939, meets such requirement, since the period of his services covers a period of at least five years.

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